

Assembly Bill No. 764

Passed the Assembly September 9, 2009

Chief Clerk of the Assembly

Passed the Senate September 1, 2009

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2009, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 10085, 10085.5, and 10133.1 of, to add and repeal Section 6106.4 of, and to add, repeal, and add Section 10085.6 of, the Business and Professions Code, and to add and repeal Section 2944.6 of the Civil Code, relating to real estate brokers.

LEGISLATIVE COUNSEL'S DIGEST

AB 764, Nava. Real estate brokers.

The Real Estate Law provides for the regulation and licensure of real estate brokers and real estate salespersons by the Real Estate Commissioner. Existing law authorizes the commissioner to require that materials used in obtaining advance fee agreements be submitted to him or her at least 10 calendar days before the materials are used and makes it a misdemeanor, punishable by a fine not exceeding \$1,000, or imprisonment in the county jail not exceeding 6 months, or both, to use any agreement that the commissioner has ordered not to be used. Existing law authorizes the commissioner to determine the form of the advance fee agreements.

This bill would instead require the commissioner to determine the form of advance fee agreements and to mandate the submission of advance fee agreement materials prior to their use. The bill would also prohibit advertisements used in obtaining advance fee agreements from using words, letters, initials, symbols, or other devices that are similar to those used by a governmental agency or nonprofit entity, as specified. The bill would also increase the maximum fine for using any agreement that the commissioner has ordered not to be used from \$1,000 to \$2,500, and would increase the maximum imprisonment time for a violation to 12 months. By expanding the scope of a crime, the bill would impose a state-mandated local program.

The Real Estate Law makes it unlawful for any person to claim, demand, charge, receive, collect, or contract for an advance fee for soliciting lenders on behalf of borrowers or performing services for borrowers in connection with a mortgage loan before the borrower becomes obligated to complete the loan and for

performing any other activity for which a license is required, unless the person is a licensed real estate broker and has complied with the provisions of the Real Estate Law. A violation of that provision constitutes a public offense punishable by a fine of up to \$10,000 for an individual or \$50,000 for a corporation. Existing law exempts from that prohibition state-chartered banks, savings associations, credit unions, industrial loan companies, and licensed finance lenders and brokers.

This bill would increase those fines to \$20,000 and \$60,000, respectively, and would increase the maximum imprisonment time for a violation to 12 months. The bill would also make it unlawful, until January 1, 2013, for a real estate broker, or any other person who performs loan modification services, as specified, to claim, demand, charge, receive, or collect a fee paid for by a borrower for a loan modification agreement, as defined, until the terms of the loan have been modified, and would require provision of a specified notice prior to entering into a loan modification agreement with a borrower. By creating a new crime, the bill would impose a state-mandated local program. The bill would make an attorney subject to disciplinary sanctions if he or she claims, demands, charges, receives, or collects a fee paid for by a borrower in connection with a loan modification agreement until the terms of the loan have been modified. The bill would further exempt from the fee prohibition licensed residential mortgage lenders and servicers. The bill would also exempt nonprofit community-based organizations, and employees of those organizations, that provide counseling services at no cost to borrowers in connection with loan modifications from certain provisions of the Real Estate Law regulating certain activities of real estate brokers and salespersons.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 6106.4 is added to the Business and Professions Code, to read:

6106.4. (a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct prohibited under Section 2944.6 of the Civil Code.

(b) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

SEC. 2. Section 10085 of the Business and Professions Code is amended to read:

10085. (a) The commissioner shall require that any or all materials used in obtaining advance fee agreements, including, but not limited to, the contract forms, letters, or cards used to solicit prospective sellers or borrowers, and radio and television advertising be submitted to him or her at least 10 calendar days before they are used. Should the commissioner determine that any such matter, when used alone or with any other matter, would tend to mislead, he or she may, within 10 calendar days of the date he or she receives same, order that it not be used, disseminated, nor published.

(1) Advertisements used in obtaining advance fee agreements shall not employ words, letters, initials, symbols, or other devices that are so similar to those used by a governmental agency, nonprofit or charitable institution, or senior organization that they could have the capacity or tendency to mislead the public. Examples of misleading materials include, but are not limited to, those that imply either of the following:

(A) The advertised services are in any manner provided or endorsed by a governmental agency, nonprofit or charitable institution, or senior organization.

(B) The advertiser is the same as, connected with, or endorsed by, a governmental agency, nonprofit or charitable institution, or senior organization.

(2) Any person using, disseminating, or publishing any matter that the commissioner has ordered, pursuant to this section, not to be used, published, or disseminated shall be guilty of a misdemeanor punishable by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding 12 months, or both, for each use, dissemination, or publication.

(b) The commissioner shall determine the form of the advance fee agreements, and all material used in soliciting prospective owners, sellers, and borrowers shall be used in the form and manner which he or she determines is necessary to carry out the purposes and intent of this part.

(c) Any violation of any of the provisions of this part or of the rules, regulations, orders, or requirements of the commissioner thereunder shall constitute grounds for disciplinary action against a licensee, or for proceedings under Section 10081, or both. These sanctions are in addition to the criminal proceedings hereinbefore provided.

SEC. 3. Section 10085.5 of the Business and Professions Code is amended to read:

10085.5. (a) It shall be unlawful for any person to claim, demand, charge, receive, collect, or contract for an advance fee (1) for soliciting lenders on behalf of borrowers or performing services for borrowers in connection with loans to be secured directly or collaterally by a lien on real property, before the borrower becomes obligated to complete the loan or, (2) for performing any other activities for which a license is required, unless the person is a licensed real estate broker and has complied with the provisions of this part.

(b) This section does not prohibit the acceptance or receipt of any fee by a bank, savings association, credit union, industrial loan company, person acting within the scope of a license issued to that person pursuant to Division 9 (commencing with Section 22000) of the Financial Code, or person acting within the scope of a license issued to that person pursuant to Division 20 (commencing with Section 50000) of the Financial Code, in connection with loans to be secured directly or collaterally by a lien on real property. This section does not apply to charges made by title insurers and controlled escrow companies pursuant to Chapter 1 (commencing with Section 12340) of Part 6 of Division 2 of the Insurance Code.

(c) A violation of this section is a public offense punishable by a fine not exceeding twenty thousand dollars (\$20,000), by imprisonment in the county jail for a term not to exceed 12 months, or by both that fine and imprisonment, or if by a corporation, the violation is punishable by a fine not exceeding sixty thousand dollars (\$60,000).

SEC. 4. Section 10085.6 is added to the Business and Professions Code, to read:

10085.6. (a) It shall be unlawful for a licensed real estate broker to claim, demand, charge, receive, or collect a fee paid for by the borrower for loan modification agreements until the terms of that loan have been modified.

(b) For purposes of this section, “loan modification agreement” means a contract for the performance of services for a borrower in connection with the modification of the terms of a loan secured directly or collaterally by a lien on residential real property containing four or fewer dwelling units.

(c) (1) A licensed real estate broker who performs a loan modification service as described in subdivision (b) for a fee paid for by the borrower shall provide the following prior to entering into a loan modification agreement with the borrower:

(A) As a separate statement, in not less than 14-point bold type:

“It is not necessary to pay a third party to arrange for a loan modification from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.”

(B) The licensed real estate broker’s license number.

(2) If a loan modification agreement is offered or negotiated in one of the foreign languages set forth in Section 1632 of the Civil Code, a translated copy of the statement in subparagraph (A) of paragraph (1) and the information required under subparagraph (B) of paragraph (1) shall be provided to the borrower in that foreign language.

(d) A licensed real estate broker who performs loan modification services as described in subdivision (b) shall notify the department in writing in a form prescribed by the commissioner within 30 days from the first performance of a loan modification agreement and shall notify the department in writing within 30 days from the last performance of a loan modification agreement by that licensed real estate broker.

(e) This section does not prohibit the acceptance or receipt of a fee by a bank, savings association, credit union, industrial loan company, person acting within the scope of a license issued to that person pursuant to Division 9 (commencing with Section 22000) of the Financial Code, or person acting within the scope of a license issued to that person pursuant to Division 20 (commencing with Section 50000) of the Financial Code, in connection with the modification of the terms of a loan secured directly or collaterally by a lien on real property. This section does not apply to charges made by title insurers and controlled escrow companies pursuant to Chapter 1 (commencing with Section 12340) of Part 6 of Division 2 of the Insurance Code.

(f) A violation of this section is a public offense punishable by a fine not exceeding twenty thousand dollars (\$20,000), by imprisonment in the county jail for a term not to exceed 12 months, or by both that fine and imprisonment, or if by a corporation, the violation is punishable by a fine not exceeding sixty thousand dollars (\$60,000). These penalties shall not be cumulative, or in addition to, the penalties provided by subdivision (d) of Section 2944.6 of the Civil Code.

(g) This section shall apply only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units.

(h) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

SEC. 5. Section 10085.6 is added to the Business and Professions Code, to read:

10085.6. (a) A licensed real estate broker who performs loan modification services as described in subdivision (b) shall notify the department in writing in a form prescribed by the commissioner within 30 days from the first performance of a loan modification agreement and shall notify the department in writing within 30 days from the last performance of a loan modification agreement by that licensed real estate broker.

(b) For purposes of this section, “loan modification agreement” means a contract for the performance of services for a borrower in connection with the modification of the terms of a loan secured directly or collaterally by a lien on residential real property containing four or fewer dwelling units.

(c) This section shall become operative on January 1, 2013.

SEC. 6. Section 10133.1 of the Business and Professions Code is amended to read:

10133.1. (a) Subdivisions (d) and (e) of Section 10131, Section 10131.1, Article 5 (commencing with Section 10230), and Article 7 (commencing with Section 10240) of this code and Section 1695.13 of the Civil Code do not apply to any of the following:

(1) Any person or employee thereof doing business under any law of this state, any other state, or the United States relating to banks, trust companies, savings and loan associations, industrial loan companies, pension trusts, credit unions, or insurance companies.

(2) Any nonprofit cooperative association organized under Chapter 1 (commencing with Section 54001) of Division 20 of the Food and Agricultural Code, in loaning or advancing money in connection with any activity mentioned therein.

(3) Any corporation, association, syndicate, joint stock company, or partnership engaged exclusively in the business of marketing agricultural, horticultural, viticultural, dairy, livestock, poultry, or bee products on a cooperative nonprofit basis, in loaning or advancing money to the members thereof or in connection with any business of that type.

(4) Any corporation securing money or credit from any federal intermediate credit bank organized and existing pursuant to the provisions of an act of Congress entitled the "Agricultural Credits Act of 1923," in loaning or advancing money or credit so secured.

(5) Any person licensed to practice law in this state, not actively and principally engaged in the business of negotiating loans secured by real property, when that person renders services in the course of his or her practice as an attorney at law, and the disbursements of that person, whether paid by the borrower or other person, are not charges or costs and expenses regulated by or subject to the limitations of Article 7 (commencing with Section 10240), and the fees and disbursements are not shared, directly or indirectly, with the person negotiating the loan or the lender.

(6) Any person licensed as a finance lender when acting under the authority of that license.

(7) Any cemetery authority as defined by Section 7018 of the Health and Safety Code, that is authorized to do business in this state or its authorized agent.

(8) Any person authorized in writing by a savings institution to act as an agent of that institution, as authorized by Section 6520 of the Financial Code or comparable authority of the Office of Thrift Supervision of the United States Department of the Treasury by its regulations, when acting under the authority of that written authorization.

(9) Any person who is licensed as a securities broker or securities dealer under any law of this state, or of the United States, or any employee, officer, or agent of that person, if that person, employee, officer, or agent is acting within the scope of authority granted by that license in connection with a transaction involving the offer, sale, purchase, or exchange of a security representing an ownership interest in a pool of promissory notes secured directly or indirectly by liens on real property, which transaction is subject to any law of this state or the United States regulating the offer or sale of securities.

(10) Any person licensed as a residential mortgage lender or servicer when acting under the authority of that license.

(11) Any nonprofit, community-based organization, or an employee of such an organization, that has been approved by the United States Department of Housing and Urban Development pursuant to Section 106(a)(1)(iii) of the federal Housing and Urban Development Act of 1968 (12 U.S.C. Sec. 1701x), to provide counseling services, when those services are provided at no cost to the borrower and are in connection with the modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property.

(b) Persons described in paragraph (1), (2), or (3), as follows, are exempt from the provisions of subdivisions (d) and (e) of Section 10131 or Section 10131.1 with respect to the collection of payments or performance of services for lenders or on notes of owners in connection with loans secured directly or collaterally by liens on real property:

(1) The person makes collections on 10 or less of those loans, or in amounts of forty thousand dollars (\$40,000) or less, in any calendar year.

(2) The person is a corporation licensed as an escrow agent under Division 6 (commencing with Section 17000) of the Financial Code and the payments are deposited and maintained in the escrow agent's trust account.

(3) An employee of a real estate broker who is acting as the agent of a person described in paragraph (4) of subdivision (b) of Section 10232.4.

For purposes of this subdivision, performance of services does not include soliciting borrowers, lenders, or purchasers for, or negotiating, loans secured directly or collaterally by a lien on real property.

(c) (1) Subdivision (d) of Section 10131 does not apply to an employee of a real estate broker who, on behalf of the broker, assists the broker in meeting the broker's obligations to its customers in residential mortgage loan transactions, as defined in Section 50003 of the Financial Code, where the lender is an institutional lender, as defined in Section 50003 of the Financial Code, provided the employee does not participate in any negotiations occurring between the principals.

(2) A broker shall exercise reasonable supervision and control over the activities of nonlicensed employees acting under this subdivision, and shall comply with Section 10163 for each location where the nonlicensed persons are employed.

This section does not restrict the ability of the commissioner to discipline a broker or corporate broker licensee or its designated officer, or both the corporate broker licensee and its designated officer, for misconduct of a nonlicensed employee acting under this subdivision, or, pursuant to Section 10080, to adopt, amend, or repeal rules or regulations governing the employment or supervision of an employee who is a nonlicensed person as described in this subdivision.

SEC. 7. Section 2944.6 is added to the Civil Code, to read:

2944.6. (a) Notwithstanding any other provision of law, it shall be unlawful for any person who performs loan modification services as described in subdivision (b) to claim, demand, charge, receive, or collect a fee paid for by the borrower for loan modification agreements until the terms of that loan have been modified.

(b) For purposes of this section, "loan modification agreement" means a contract for the performance of services for the borrower in connection with the modification of the terms of a loan secured directly or collaterally by a lien on residential real property containing four or fewer dwelling units.

(c) (1) A person who performs a loan modification service as described in subdivision (b) for a fee paid for by the borrower shall provide the following prior to entering into a loan modification agreement with the borrower:

“It is not necessary to pay a third party to arrange for a loan modification from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.”

(2) If a loan modification agreement is offered or negotiated in one of the foreign languages set forth in Section 1632 of the Civil Code, a translated copy of the statement in paragraph (1) shall be provided to the borrower in that foreign language.

(d) A violation of this section by a natural person is a public offense punishable by a fine not exceeding twenty thousand dollars (\$20,000), by imprisonment in the county jail for a term not to exceed 12 months, or by both that fine and imprisonment, or if by a corporation, the violation is punishable by a fine not exceeding sixty thousand dollars (\$60,000). Except as provided in subdivision (f) of Section 10085.6 of the Business and Professions Code, these penalties are cumulative to any other remedies or penalties provided by law.

(e) This section does not apply to a person, or an agent acting on that person’s behalf, offering loan modification or other loan forbearance services for a loan owned or serviced by that person.

(f) Nothing in this section precludes a person, or an agent acting on that person’s behalf, who performs a loan modification agreement for a loan owned or serviced by that person, from doing any of the following:

(1) Collecting principal, interest, or other charges under the terms of a loan, before the loan is modified, including charges to establish a new payment schedule, after the borrower reduces the unpaid principal balance for the express purpose of lowering the monthly payment due under the terms of the loan.

(2) Collecting principal, interest, or other charges under the terms of a loan, after the loan is modified.

(3) Accepting payment from a federal agency in connection with the federal Making Home Affordable Plan or other federal plan intended to help borrowers refinance or modify their loans or otherwise avoid foreclosures.

(g) This section shall apply only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units.

(h) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

SEC. 8. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Approved _____, 2009

Governor